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WILMER, CUTLER & PICKERING

2445 M STREET, N.W.

WASHINGTON, D.C. 20037-1420

TELEPHONE (202) 663-6000

FACSIMILE (202) 663-6363

DAVID G. GRAY
DIRECT LINE (202) 663-6299
INTERNET DGRAY@WILMER.COM

100 LIGHT STREET
BALTIMORE, MD 21202
TELEPHONE (410) 986-2800
FACSIMILE (410) 986-2828

4 CARLTON GARDENS
LONDON SW1Y 5AA
TELEPHONE 011 (44) 171 872-1000
FACSIMILE 011 (44) 171 839-3537

RUE DE LA LOI 15 WETSTRAAT
B-1040 BRUSSELS
TELEPHONE 011 (32) 285-4900
FACSIMILE 011 (32) 285-4949

FRIEDRICHSTRASSE 95
D-10117 BERLIN
TELEPHONE 011 (49) 30 2022-6400
FACSIMILE 011 (49) 30 2022-6500

January 26, 1999

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FEDERAL BUREAU OF INVESTIGATION
OFFICE OF THE DIRECTOR

BY HAND

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

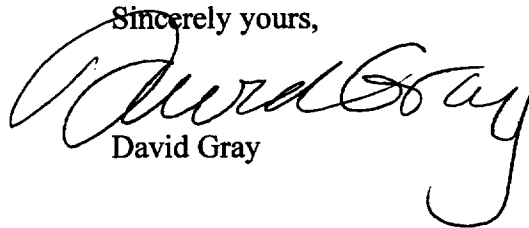
Re: *Idaho Public Utilities Comm'n Petition for Rulemaking pursuant to
Section 251(h)(2),
CC Docket No. 98-221*

Dear Ms. Salas:

On behalf of U S WEST Communications, Inc. ("U S WEST"), I have enclosed for filing with the Commission an original and twelve copies of the attached Reply of U S WEST Communications, Inc. supporting the above-referenced petition for rulemaking. I have also attached a copy of the Reply to be date-stamped and returned with the courier.

I thank you for your attention to this matter. If there are any questions concerning the above matter, please communicate directly with the undersigned.

Sincerely yours,



David Gray

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JAN 26 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:)
)
Idaho Public Utilities Commission)
Petition for Rulemaking Pursuant to)
Section 251(h)(2) of the Communications Act)

CC Docket No. 98-221

REPLY OF U S WEST COMMUNICATIONS, INC.

U S WEST Communications, Inc. ("U S WEST") submits this reply in support of the petition of the Idaho Public Utilities Commission ("Idaho PUC") to treat CTC Telecom, Inc. ("CTC") as an incumbent local exchange carrier ("ILEC") pursuant to section 251(h)(2) of the Communications Act of 1934. After the filing of oppositions by CTC and its supporters, it remains undisputed that CTC will be the only authorized telecommunications carrier with facilities in the new Hidden Springs development. CTC therefore meets the three-part test established by section 251(h)(2) of the 1996 Act and should be classified as an ILEC under the statute. At most, CTC may be entitled to the *temporary* rural telephone company exemption provided by Congress in section 251(f)(1) -- not a *permanent* exemption from the obligations imposed on ILECs simply because its network was constructed after the passage of the Telecommunications Act of 1996 ("1996 Act").

I. CTC'S SIZE DOES NOT EXEMPT IT FROM CLASSIFICATION AS AN ILEC.

The opponents of the Idaho PUC's petition do not refute the dispositive facts in this proceeding: CTC will own, operate, and exercise sole control over the local telecommunications network serving the Hidden Spring development, a discrete community of over 900 residences and businesses. As the developer's chosen telecommunications provider,

CTC's network will automatically reach every residence and business in the Hidden Springs community; no other telecommunications carrier will have facilities in the development, and U S WEST will not provide service in Hidden Springs.^{1/} Thus, CTC will be the default local telephone company for every potential subscriber in that community and will in all likelihood provide service to all or virtually all of those subscribers.

CTC therefore qualifies as an ILEC under the three-factor test set out in section 251(h)(2) and interpreted by the Commission in the *Guam Declaratory Ruling*.^{2/} First, as the default local service provider in Hidden Springs, CTC will "control the bottleneck local exchange network" and will occupy a "dominant position" with respect to subscribers in that community;^{3/} CTC accordingly will "occup[y] a position" in Hidden Springs "comparable" to that of an ILEC.^{4/} Second, CTC will "substantially replace[]" an ILEC within the meaning of section 251(h)(2)(B) because it will "provide local exchange service to all or virtually all of the subscribers in an area that did not receive [such] service from an [ILEC]"^{5/} -- indeed, CTC will provide service in a community in which U S WEST has not provided and will not provide service. Third, the classification of CTC as an ILEC will serve "the public interest" because such

^{1/} As noted in U S WEST's initial comments, the only U S WEST facilities in the area are two access lines that at one time provided service to a school. That school is no longer in operation and that service has been discontinued.

^{2/} *Guam Public Utilities Commission Petition for Declaratory Ruling*, Declaratory Ruling and Notice of Proposed Rulemaking, 12 FCC Rcd 6925 (1997) ("*Guam Declaratory Ruling*").

^{3/} *Id.* ¶¶ 26, 27

^{4/} 47 U.S.C. § 251(h)(2)(A).

^{5/} *Guam Declaratory Ruling* ¶ 31.

treatment will “promot[e] competition in local exchange and exchange access markets.”^{6/} If CTC were not treated as an ILEC, potential competitors would have none of the avenues of access to customers envisioned by section 251(c).

Opponents of the Idaho PUC petition do not dispute that CTC’s local network will reach every home in the Hidden Springs development or that CTC will be the default local telephone company for every subscriber who purchases a home in that community. Instead, they argue that a carrier may not be classified as an ILEC under section 251(h)(2) unless it is “an established carrier with market power (such as a RBOC),” *CTC Comments* at 13, and its size and market position will give it the “economies of density, connectivity, and scale” enjoyed by RBOCs like U S WEST, *id.* at 9, 11, 13-16, 19, 21. Thus, they assert, no carrier as small as CTC can be treated as an ILEC even if it owns the only telecommunications network serving a community.^{7/}

Nothing in the statute, however, supports the notion that section 251(h)(2) applies only where a carrier is both large and serves a large region. Such a rule would read section 251(h)(2) out of the statute -- there is virtually no likelihood that a carrier that is not *already* an ILEC ever will satisfy those criteria.^{8/} Moreover, the existence today of hundreds of small ILECs

^{6/} *Id.* ¶ 40.

^{7/} CTC contends that TCI’s construction of a cable network in the Hidden Springs development forecloses treating CTC as an ILEC. *See CTC Comments* at 12, 20. But the speculative possibility that TCI in the future may seek permission from the Idaho PUC to provide local telecommunications services to the residents of Hidden Springs provides no basis at this time for a decision that CTC is not “comparable” to an ILEC.

^{8/} The Guam Telephone Company (“GTA”) did fit the interpretation proposed by CTC and its supporters because it was an established local carrier that had not joined NECA and
(continued...)

refutes the proposition that a carrier must operate an extensive network to be “comparable” to an ILEC. CTC’s own parent and affiliate together serve only 2,039 access lines in southern Idaho -- networks potentially smaller than that serving Hidden Springs^{2/} -- but are ILECs nonetheless. *See CTC Comments* at 4. So are many other existing local exchange carriers that are “comparable” in scale and density to the Hidden Springs network. Thus, opponents of the Idaho PUC’s petition urge the Commission to draw a bright line between two categories of small LECs, otherwise identical, based solely on when they came into existence: According to opponents, those carriers that satisfy the criteria of section 251(h)(1) are automatically ILECs because they existed before the 1996 Act was passed; new carriers having the very same market position are not, however, simply because they entered a given market after passage of the 1996 Act. That approach would be utterly capricious, and would fail to give effect to what the Commission itself has recognized to be the “most important[]” characteristic of an ILEC: whether it has “control over the bottleneck local exchange network.” *See Guam Declaratory Ruling* ¶ 33.

The existence of the rural telephone company exemption confirms that Congress intended section 251(h)(2) to apply to *all* carriers that are “comparable” to ILECs, large or small. In section 251(f)(1), Congress addressed the concerns of small carriers that may not have the resources to uphold the obligations imposed by section 251(c). Congress did not *permanently*

^{8/} (...continued)
therefore was not an ILEC under the statute. *See Guam Declaratory Ruling* ¶ 14. The Commission, however, concluded that no LEC was similarly situated to GTA. *See Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers*, Report and Order, FCC 98-163, at ¶ 14 (FCC 1998). There is no reason to think that Congress adopted section 251(h)(2) to apply to a single isolated carrier.

^{2/} CTC will provide up to six access lines to each of the 900 lots in the Hidden Springs development. *See CTC Comments* at 3.

excuse such carriers from section 251(c), but rather gave them an automatic, but *temporary*, exemption from that section. *See* 47 U.S.C. § 251(f)(1). If CTC qualifies as a rural telephone company under 47 U.S.C. § 153(37)(B), it is entitled to the limited exemption bestowed by section 251(f)(1). If CTC receives a request pursuant to section 251(f)(1)(A)(i), the very arguments advanced by CTC's comments in this proceeding may persuade the Idaho PUC to leave the exemption in place. But there is no reason for the Commission to interpret section 251(h)(2) to give CTC and other small carriers an immunity from section 251(c) that Congress did not grant them in section 251(f). Because CTC controls the local bottleneck facilities in Hidden Springs, it should be treated as an ILEC; the question whether it should be excused from certain obligations imposed on ILECs should be left to the Idaho PUC.

II. THE COMMISSION SHOULD NOT DELAY THE RESOLUTION OF THIS CASE PENDING THE DEVELOPMENT OF A GENERALLY APPLICABLE INTERPRETATION OF SECTION 251(h)(2).

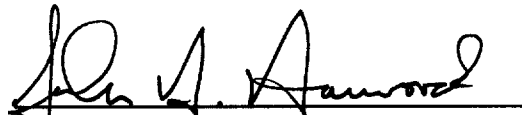
Since substantially all of the commenters agree that the issues presented by CTC's circumstances -- the provision of service to a new development nominally within the service area of an existing ILEC -- will arise again and again, the Commission should resolve those issues through the promulgation of general rules. The Commission, however, need not address all issues necessary to the formulation of such general rules in order to determine that CTC meets the statutory test for an ILEC. It is unnecessary, for example, for the Commission to resolve in this proceeding the technical aspects of what constitutes a "market" within the meaning of section 251(h)(2). The local network that CTC is constructing in the Hidden Springs

development will not serve a single home or apartment building,^{10/} but rather will provide basic and advanced telecommunications to a distinct suburban area comprising over 900 residences and small businesses. As noted earlier, many ILECs operate smaller networks, and the Hidden Springs exchange may outgrow the networks of CTC's parents. Thus, irrespective of the theoretical existence of a threshold below which a carrier cannot qualify as an ILEC, CTC plainly exceeds the minimum size and should be treated as an ILEC.

CONCLUSION

For the foregoing reasons, and those set forth in U S WEST's comments, the Commission should declare that CTC will be treated as an ILEC for purposes of section 251(c).

Respectfully submitted,



John H. Harwood II
Lynn Charytan
David Gray
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Dan L. Poole
Robert B. McKenna
John L. Traylor
U S WEST Communications, Inc.
1801 California Street
Denver, Colorado 80202
(303) 672-2900

Counsel for U S WEST Communications, Inc.

January 26, 1999

^{10/} Compare, e.g., *Ameritech Comments* at 3, 7-8 (arguing that section 251(h)(2) applies to any carrier that extends local loops to serve a previously unserved development, street, or building, regardless of size) with *Time Warner Comments* at 7-8 (countering that Congress "cannot have intended such a result").

CERTIFICATE OF SERVICE

I, David G. Gray, do hereby certify that on this 26th day of January, 1999, I caused a copy of the foregoing Reply of U S WEST Communications, Inc. in CC Docket No. 98-221 to be served by hand delivery or first class mail, postage prepaid, on the following parties:

Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W. TW-A325
Washington, D.C. 20554

Janice M. Myles
Common Carrier Bureau
Federal Communications Commission
Room 544
1919 M Street, N.W.
Washington, D.C. 20554

Alan G. Lance, Attorney General
Cheri C. Copsey, Deputy Attorney General
Idaho Public Utilities Commission
P.O. Box 83720
Boise, ID 83720-0074

International Transcript Services, Inc. (ITS)
1231 20th Street, N.W.
Washington, D.C. 20036

Robert S. Tanner
Mark Trinchero
Molly M. O'Leary
Davis Wright Tremaine LLP
1155 Connecticut Avenue, N.W.
Suite 700
Washington, D.C. 20036

Mark C. Rosenblum
Roy E. Hoffinger
AT&T Corporation
Room 3249J1
295 North Maple Avenue
Basking Ridge, N.J. 07920

Gary L. Phillips
Ameritech Corporation
1401 H Street, N.W. # 1020
Washington, D.C. 20005

Charles C. Hunter
Catherine M. Hannan
Hunter Communications Law Group
1620 I Street, N.W.
Suite 701
Washington, D.C. 20006

Brian Conboy
Thomas Jones
John McGrew
Willkie, Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036

Kecia Boney
MCI Worldcom, Inc.
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Benjamin H. Dickens, Jr.
Gerard J. Duffy
Michael B. Adams, Jr.
Blooston, Mordkofsky, Jackson & Dickens
2120 L Street, N.W.
Washington, D.C. 20037



David G. Gray